Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 143.

NORTHERN PACIFIC RAILWAY COMPANY
Petitioner,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

STATEMENT.

Louise H. Adams, widow, and Frank H. Adams, son, of J. H. Adams, deceased, in this action recovered damages against the Northern Pacific Railway Company for the death of J. H. Adams. The action was brought in the Circuit Court for the District of Washington, the jurisdiction of which court was based on diverse citizenship.

The trial resulted in a verdict for the plaintiffs below and judgment for $14,000 was entered on the verdict (Transcript, p. 41). Upon the pleadings and a bill of exceptions duly settled, the case was

taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit, which court affirmed the judgment. This court granted a writ of certiorari.

The death occurred in the State of Idaho and it is sought to sustain the recovery by a statute of that State reading as follows:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The grounds of negligence relied on were two.

(a) That the defendant (this petitioner) having accepted deceased as a passenger, ran the train at so high a rate of speed around curves as to throw him off a platform while he was passing from one car to another.

(b) That one car in the train was provided with no vestibule, the remainder of the cars being vestibuled, whereas it was alleged that the railway company had advertised the train as a vestibuled train.

The defendant, besides denying negligence in either of the particulars alleged, set up a further defense (Transcript, pp. 14, 15, 16) that the deceased was, and for a long time had been, the attorney of various railway companies (but not of the

defendant) and was a *gratuitous* passenger, traveling on a free pass issued to him as such, endorsed on which was the following contract by him signed.

"CONDITIONS."

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

"JAY. H. ADAMS."

"This pass will not be honored unless signed in ink by the person for whom issued."

The trial court on motion and demurrer struck out the portion of the answer last referred to, holding that, while the contract made in the State of Washington where the action was brought and where such contracts had been held binding (*Muldoon v. Seattle City Ry.*, 7 Wash. 528) might have bound the deceased as to any damages *he* might have sustained from personal injury, it could not bind his heirs with respect to the damages *they* claim under the statute (Transcript, pp. 21-23).

The essential facts as to defendant's alleged negligence are as follows:

Deceased had lived for many years in Spokane, State of Washington; had been a lawyer by profession and the attorney of several railway companies;

in the trial of cases and in other work for these companies he had traveled much of his time on defendant's railway, and on other railways in that section; he was very familiar with such travel.

On November 13, 1898, he, with a friend, went on a Northern Pacific train from Spokane to Hope, Idaho, about 85 miles distant, on the main line of the Northern Pacific road; after remaining several hours at Hope they returned on the west-bound overland train, which was about three hours late; deceased and his friend went into the train together. It seems probable that they entered the train by one of the unvestibuled platforms (Transcript, pp. 50-51, 276). They went forward into the smoking car.

The train consisted of an engine and eight cars, in the following order, viz: engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, standard Pullman sleeper (Transcript, p. 215).

All the cars were vestibuled, except the "tourist sleeper," immediately in front of the dining car. It had open platforms like an ordinary passenger coach; that is, with hand railings running along the end of the body of the car and end of the platform down to the steps and about 2½ or 3 feet high (Transcript, pp. 43-44).

Shortly after leaving Hope, Mr. Adams rose from his seat in the smoking car, leaving his overcoat, and said he was going back to the dining car for some cigars (Transcript, p. 46). His friend never saw him afterwards. The testimony, however,

shows, and it is not questioned, that Mr. Adams passed toward the rear end of the train, through the day coach and through the tourist sleeper, across the open platforms thereon and into the dining car (Transcript, pp. 268-9). After buying some cigars in that car Mr. Adams went forward; at this time the train was going at a fairly good speed over a crooked piece of track (Transcript, pp. 269-270) and Mr. Adams is shown to have had difficulty in keeping his balance in the aisles of the car (Transcript, pp. 269, 270, 271). After this, so far as is known, no one saw him before his death. His body was found the next day opposite a curve in the railroad track and some distance therefrom, at a point about 6½ miles west of Hope. His body when found was mutilated in a manner which indicated quite clearly that he had fallen from the train.

There was no *evidence* whatever to prove that Mr. Adams was *thrown off the platform by the lurching of the train* while carefully passing from one car to another. For aught that appears it may have been a case of suicide, or of sudden illness; or Mr. Adams may have stumbled and fallen, or may have been riding on the platform; or the accident may have been the result of his own want of care in not using the iron rails or hand-holds.

That deceased boarded the train upon an unvestibuled platform is questioned by plaintiffs' counsel. Whether he did or not is immaterial, because he had traveled over, while the train was in motion, both the unvestibuled platforms in going back to the dining car. And the trial court properly charg-

of the jury that Mr. Adams must have known these platforms were unventilated (Transcript, p. 460).

The trial court charged the jury that they might find the petitioner liable because either of the speed of the train or the lack of a vestibule (Transcript, p. 456). It cannot be determined therefore upon which of these grounds the verdict rests.

Assignment of Errors

Errors are assigned in the record (Transcript, pp. 465-470). The errors here relied on may be thus summarized:

1. The court erred in submitting to the jury the speed of the train as a ground of defendant's liability.

2. The court erred in submitting to the jury the unventilated condition of the cross car platforms as a ground of defendant's liability.

3. The court erred in allowing the jury to find without evidence that the cause of the death was either the speed of the train or the want of ventilation.

4. The court erred in ruling that the contract on the back of the pass exempting defendant from liability was inapplicable to this case. And

Herein that the court erred in charging (Transcript, p. 456):

"You are not to consider what was the duty

of this carrier toward Mr. Adams who was killed, but the duty which the defendant owed to these plaintiffs (his heirs); and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general."

5. The court erred in refusing the request that a verdict be directed for defendant (Transcript, p. 463).

ARGUMENT.

I.

As to the *speed of the train* the verdict rests on the most flimsy foundation and cannot be sustained, unless it is to be held that trains must be run at speeds to suit the varying ideas of juries.

True, there was some testimony of considerable swinging and lurching of the train. But the train ran and arrived safely. No accident occurred to it, or so far as appears, had ever happened to any other train upon this section of road, though faster time was often made. A straight track cannot be built through a mountainous country, and there is no charge that this track was negligently located or built. The lurch and swing of trains around curves is one of the ordinary things universally experienced upon all but a few unusually straight tracks. A high speed is customarily maintained upon curves,

safety being provided for by elevation of the outer rail. Upon the curve in question this elevation was a slight fraction under six inches.

The distance Hope to the next stop, Sand Point, sixteen miles, was run by this train in twenty-four minutes, an average of forty miles per hour (Transcript, p. 181). The learned Circuit Court of Appeals falls into an error in saying (Transcript, p. 492) that the *ordinary* schedule between these stations was thirty-five minutes. This, it is true, was the then schedule for that train, but other schedules had been ordinarily faster; time card, summer 1896, 25 minutes (Transcript, p. 181); many other cards 25, 27 and 28 minutes (Transcript, p. 193). The engineer of this train had made the run as fast as 19 minutes (Transcript, p. 182), often in 21 minutes (Transcript, p. 182), with no unusual lurch. He had run over the particular curve where it is said deceased was thrown off more than a hundred times at a faster rate than on the day in question (Transcript, p. 200).

Though the train and its passengers (except Mr. Adams) passed over safely, and though several witnesses noticed no unusual motion, and though there is no evidence that any unusual lurch of the train really threw Mr. Adams off, or that he was in the exercise of proper care, yet because the mail bags were tipped over in the mail car and the newsboy was car sick, the speed of this train was submitted as one of the grounds of defendant's liability to the opinion of twelve jurymen, none of whom presum-

ably knew the slightest thing of running railway trains.

II.

The *want of vestibules* on the platforms of the tourist sleeping car was improperly submitted to the jury as a ground of liability (Instructions marked (22) and (29), Transcript, pp. 455, 456, 464).

As before stated, it is probably the fact that the deceased boarded the train by one of these unvestibuled platforms. At any rate it is not disputed that in going for cigars from the smoking car to the dining car he passed while the train was in motion over both open platforms. It was broad daylight and the rush of sound and wind must have forced his attention to the open character of the platforms. The trial court charged that he must be presumed to have known of them and to have acted with perfect knowledge of the fact (Transcript, p. 460).

He was not forced or urged to cross these platforms. He crossed them first to get cigars, and attempted to go back over them apparently to smoke them. No duty, no imperative business, no stress of circumstances, forced him to do so. He was at perfect liberty to wait until the train stopped or was moving slowly. It appears in evidence that Mr. Adams had some difficulty in keeping his balance in the aisles of the dining car, owing to the motion of

the train around curves. And he *voluntarily*, with full knowledge of all the conditions, undertook to pass over the open platforms.

It is a principle of law too plain to need discussion that he assumed the risk incident to the open character of the platforms; notwithstanding which the trial court submitted to the jury to find the defendant liable by reason of their open character; and the Circuit Court of Appeals so far failed to apprehend the point as to say (Transcript, p. 495) that we claimed *contributory negligence* on Mr. Adams' part in passing to and from the dining car while the train was in motion. No such proposition was asserted in that court, or will be asserted here. But we do assert that when deceased voluntarily, with full knowledge of all the conditions, attempted to cross the platforms, he assumed whatever element of risk was incident to their open condition.

The case cannot, we think, be distinguished from *Sansom v. Southern Ry. Co.*, 50 C. C. A., 53. In that case the decision was directly the reverse of that in the case at bar.

As the court well said in the *Sansom case*, if the deceased had been assured by the advertisements of the railway company that the train was completely vestibuled, and if, relying on such statement, he failed to take those precautions which he otherwise would have taken, and was for that reason injured, he might recover. But the obvious character of the risk and Mr. Adams' complete knowledge of it, show that he was not deceived or lulled into security

by the defendant's advertisements, or by any false appearance.

The record contains some interesting testimony upon vestibules, their purpose and use, which, for *the reasons before stated*, we apprehend is immaterial, but in passing it may not be out of place to allude to it. The witnesses were, Henry R. Williams, General Manager Chicago, Milwaukee & St. Paul Railway Company; Charles A. Goodnow, Assistant General Superintendent of the same company; A. B. Newell, Superintendent Western Division Lake Shore & Michigan Southern Railway Company; A. J. Hitt, General Superintendent Chicago, Rock Island & Pacific Railway Company; A. W. Sullivan, General Superintendent Illinois Central Railroad Company, and W. C. Brown, General Manager Chicago, Burlington & Quincy Railroad Company. This evidence is contained, pages 293 to 360, inclusive, of the transcript. Its sum and substance is, that vestibules were not invented and are not used for the purpose of preventing passengers from being thrown off a platform by the motion of the train. They are aids in preventing telescoping of cars in case of wreck, they assist in keeping the cars warm in winter, they make passage from one car to another more comfortable, protecting from rain, snow, cinders, sparks and dust, they make a train more attractive in appearance and more comfortable. These witnesses all admit that while they make crossing a platform safer for a child or decrepid person, this was not the reason of their introduction, and that passage from one car

to another over open platforms has never been regarded as unsafe for any person in the full possession of his faculties and in the exercise of reasonable care. This testimony also shows conclusively that in 1898, upon all the railroads of the country, the percentage of vestibuled equipment was very small, and that unvestibuled cars were commonly and habitually placed in trains otherwise vestibuled whenever that became convenient or necessary; that there was no objection to it and it was good railroad practice; that it was done when necessary upon all trains, and customarily upon all but a very few extra fare or so-called limited trains.

At the time in question the tourist sleeping cars on the defendant's railway, as well as upon other railways, had not been vestibuled. They were run by the Pullman Company generally upon all the railways, and one or more was run in each of the defendant's overland trains. They were placed just ahead of the dining car (Transcript, p. 218). Mr. Adams was a frequent traveler upon the trains of the defendant and had been for a number of years prior to his death, and every one of the main line trains upon which he had traveled had had one or more unvestibuled cars (Transcript, p. 365).

The statement of facts by the Circuit Court of Appeals (Transcript, p. 488) contains a serious error. It is there said that the tourist sleeper was "not only not vestibuled, but had no device whatever for enclosing its platforms or guarding persons who might be upon the same." The platforms had in fact hand rails of iron enclosing them completely, ex-

cept an opening required for walking to the next car, and one on each side where the steps descended. The platforms were exactly like those in customary use upon first-class unvestibuled cars (Transcript, pp. 43-4).

III.

There was, we submit, no sufficient evidence of the gist of plaintiffs' case; namely, that the real cause of Mr. Adams' death was either lurching of the train or the want of a vestibule.

The verdict rests as to this central element not upon any evidence, but upon presumption—or rather upon two presumptions.

The platforms being equipped with iron rails, intended among other things as hand holds, and they being in common experience sufficient to enable any able-bodied adult passenger to move from car to car in safety in spite of motion and lurching of the train, and nothing appearing except that the deceased fell from the car, the most improbable inference possible to be drawn is, that he was thrown off by motion while holding on to the rails to the best of his ability.

Given a train in rapid motion over a crooked piece of track, any person using ordinary care would grasp the iron rails for safely crossing an open platform. It may not be *impossible* that such a person should be thrown off the train, but it is most

highly improbable and contrary to all experience. The alleged cause of the accident is *prima facie* inconsistent with the deceased being in the exercise of care; i. e. using the hand holds. If he used them, it is difficult to see how the lurching of the train could throw him off. If he was so thrown off, it is strong proof that he was not using them.

The jury was told they should *presume* Mr. Adams was crossing the platform with due care; and they were also allowed to *presume* that a lurch of the train threw him off. The verdict therefore rests not only on *presumption*, but on *two* presumptions, which in point of fact are not consistent with each other.

We shall not discuss the burden of proof as to negligence or contributory negligence. See *Beach Contributory Negligence*, chap. XV. The ordinary rule of the Federal Courts as to contributory negligence is, that the burden is upon the defendant. But the presumption of care on the part of the plaintiff cannot be indulged where it is contrary to the proven facts or contrary to the theory on which plaintiff must establish his main contention, i. e. that the cause of his injury was defendant's negligence.

Moreover, consider whether the proofs warrant a finding that the death was caused by the roll or lurch of the train. They are as consistent with suicide, with vertigo or other sudden illness, with a stumble or other similar accident.

The case of *Reidhead v. Skagit County*, 73 Pac. Rep., 1118 (unreported), decided by the Supreme

Court of Washington, seems indistinguishable from this case.

"The definite and specific proving power of circumstantial evidence depends upon its incompatibility with, and incapability of explanation upon any reasonable hypothesis other than that of the truth of the principal fact, in proof of which it is adduced."

Wills on Circumstantial Evidence, p. 274.

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well-settled rule."

Asbach v. Ry. Co., 74 Ia. 248, 250;
Carruthers v. Ry. Co., 55 Kan. 600;
Wheelan v. Ry. Co., 85 Ia. 167;
Ruppert v. R. R. Co., 154 N. Y. 90.

"When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other; as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture; and a bare possibility that the damage was caused in consequence of the negligence

and unskillfulness of the defendant, is not sufficient."

Searles v. Ry. Co., 101 N. Y. 661, 662;
Affirmed in *Grant v. Ry. Co.*, 133 N. Y. 659.

Where the evidence is equally consistent with either view—the existence or non-existence of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has failed to establish it. This is a rule which never ought to be lost sight of.

Cotton v. Wood, 8 C. B. (N. S.) 568;
Thompson on Negligence, sec. 364;
Baulec v. R. R. Co., 59 N. Y. 356;
Hayes v. Ry. Co., 97 N. Y. 259;
R. R. Co. v. Schertle 97 Pa. St. 450;
Wieland v. D. & H. Canal Co., 167 N Y. 19;
Wiwirowski v. Ry. Co., 124 N. Y. 420;
Cordell v. Ry. Co., 75 N. Y. 330;
Tyndale v. R. R. Co., 156 Mass. 503.

Conjecture cannot be allowed to supersede proof, and a jury will not be permitted to conjecture how an accident occurred.

Borden v. R. R. Co., 131 N. Y. 671;
R. R. Co. v. State, 73 Md. 74;
Quincy, etc. v. Kitts, 42 Mich. 34;
Steffen v. Ry. Co. 46 Wis. 259
Sorenson, Admr. v. Paper Co., 56 Wis. 338;
Manning v. Ry. Co., 105 Mich. 260;
Finkelston v. Ry. Co., 94 Wis. 270;
Ellison v. Receiver, &c., 49 Minn. 240;
Orth v. R. R. Co., 47 Minn. 384;
Hewitt v. R. R. Co., 67 Mich. 61.

IV.

Deceased was riding on a pass issued to him as a gratuity, and not upon any valuable consideration.

Endorsed upon this free ticket was a contract, *executed by him*, reading,

> "The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same."

The action cannot be maintained except upon the following statute of Idaho:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The contract on the pass was valid by the laws of Washington, where it was entered into and where Mr. Adams resided; *Muldoon v. Seattle City Ry. Co.*, 7 Wash. 528 (s. c. 10 Wash. 311). But doubtless in the Federal Courts the question is one of general law; *Liverpool &c Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442; *Lake Shore Ry. v. Prentice*, 147

U. S. 101; *Hartford Ins. Co. v. Ry. Co.*, 175 U S. 91.

The learned District Judge before whom the case was tried did not hold that this contract was invalid. Without questioning its binding force he held (Transcript, pp. 21-23) that the contract of the *deceased* could have no effect upon a right secured by statute to his *heirs*. It was said that they sue, not in right of the deceased, but upon a statute which gives them a new and original right not derived from the deceased or dependent on his acts; that they were not parties to the contract and cannot be bound by it.

Throughout the trial every effort of the defendant to show the *status* of the deceased—his relation to the defendant—was overruled, and the trial judge finally told the jury that they *were not to consider what duty the railway company owed to the deceased, but what duty it owed to his heirs, the plaintiffs* (Transcript, p. 456).

The Court of Appeals affirms this view and also adds another, viz: *that the pass contract cannot be construed as including personal injury resulting in death*. The Court held (Transcript, p. 490) (a) "A man's life is not his own to be disposed of by contract. A man may not barter away his life, or his freedom, or his substantial rights." * * * "The expressed permission by the deceased, therefore, that the railroad company might negligently take his life without consequent liability would have been in violation of both the common and statute law, and a void contract." (b) The contract does not extend to "death" because it says "injury to the

person," which the learned court says *presumes a continuation of life.*

(A) Consider first the proposition that the statutory cause of action cannot be affected by any act or contract of the deceased. This view is certainly novel.

Lord Campbell's act gives a right of action for death "in case the wrongful act or neglect or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." This language or equivalent has been incorporated into the statutes of most of the states, but, we believe, has been omitted in the statutes of Connecticut, California, Georgia, Iowa, New Hampshire, Pennsylvania, Kentucky, Idaho, North Dakota and Washington.

The omission of this express condition is what the court below relies on in saying that it cannot be implied. The general rule applied to our American statutes following Lord Campbell's act has been, that though varying in terms they are intended to accomplish the same result and are to be construed alike. In respect to damages for example they vary widely. The California, Idaho and Washington statutes differ from most and say that a jury may give such damages as shall under all the circumstances of the case be just. Yet it has been held under those statutes that in negligence cases damages are to be confined as under Lord Campbell's act, to pecuniary

damages. (*Hennessy v. Herrington* (1894) 84 Cal. 315, 327; *Kleparski v. Dimmick*, 34 Wash., 426, 444). Mr. Tiffany in his book "Death by Wrongful Act," sec. 43, calls attention to the fact that the condition in question has not been expressed in the statutes of several states, and says that no case has been found in which it has not been implied.

No doubt the general rule of law (*The Stella* L. R. Probate Div. [1900] 161) and the general rule of justice is, that no action can be maintained by heirs or representatives where the deceased could not have sued. Judge Hamlin in his opinion (Transcript, p. 27) considers this to be the rule when the suit is brought by the "representatives" of deceased, but denies it where the suit is brought by the "heirs." The Circuit Court of Appeals goes further and holds that either "heirs" or "representatives" could recover, though the deceased could not (Transcript, p. 192). The statute of Idaho says the suit may be brought by "his heirs or personal representatives." And whether brought by the one or the other the cause of action is the same, founded on and created by the same statute. It is not claimed by any that if these plaintiffs had sued as "executors" their cause of action would have been of essentially a different nature from the cause of action in this case where they sue as "heirs." The fact that the statute gives the right to sue to the "personal representatives" of the deceased, or to his "heirs," is a plain implication that the action can be maintained only where the deceased might have recovered.

The decisions here is that the deceased assumed the

risks—that he was not a passenger—that as to him the defendant was not bound to exercise that *highest* degree of care which a common carrier owes to its passengers. The learned District Judge was forced by the logic of his ruling into what seems to us a *reductio ad absurdum*, viz: that the jury *could not consider what duty the railway company owed to deceased.*

Where the statute in question requires the act of defendant to be "wrongful," what is meant by wrongful? Evidently *legally* wrongful. Consisting of facts which the law defines as a legal wrong—such as give rise to a legal liability. If the deceased assumed the risk, if he released the defendant from liability, if by valid contract he arranged for a different degree of care from that required by the common law, then the defendant's act may not have been "wrongful." The statute evidently means *wrongful as respects the deceased.*

The statute requires either wrongful act or "*neglect.*" What is neglect? Evidently a lack of that degree of care to which the *deceased* was entitled, under all the circumstances of the case, as *between him and the defendant.*

What follows from a different view? Certainly it follows that contributory negligence of the deceased would be no defense; nor would it be a defense that he was a fellow servant with him by whose negligence he was injured; nor would it exempt the defendant that he had as a servant, or otherwise, assumed risks, and was injured by one of the risks assumed. It follows also from the view

of the lower court that deceased could have given no release had he survived, and also that had he survived, sued and recovered damages for his injury and then died, his recovery would have been no bar to this action.

The learned trial judge having been logical up to the point of telling the jury they could not consider what duty the carrier owed to the deceased, should have followed his reasoning to its necessary result and told the jury that *contributory negligence of the deceased would not bar the action of his heirs.* But here the court became inconsistent and charged (Transcript, p. 457) that the action of the heirs would be barred by Mr. Adams' contributory negligence.

And contributory negligence has been held a good defense even under statutes like the one in question not containing the express condition of Lord Campbell's act above quoted (*Quinn v. N. Y., N. H. & H. R. R. Co.*, 56 Conn. 44; *Lane Adm'r. v. Cent. Iowa R. R. Co.*, 69 Iowa, 443; cases cited in note to sec. 66 Tiffany).

The Circuit Court of Appeals cites in support of its conclusion *Munro v. Dredging Co.*, 84 Cal., 515, and *Chesapeake & Ohio R. R. v. Dixon*, 179 U. S., 131. In the first case the question was simply whether the damages were part of the estate of deceased subject to his debts. It was held they were *not*, which is according to the general rule under all the statutes. No question touching or relating to the one here raised was involved in the case cited

from 179 U. S. Neither decision touches the matter in hand in the remotest degree.

(B) The Circuit Court of Appeals says that a contract modifying the ordinary liability *"for any injury to the person"* does not cover injuries to the person resulting in death. But certainly "any injury to the person" means all injuries regardless of result. The deceased died from an injury to the person and all injuries to the person are within the terms of this contract.

And suppose we admit, that the deceased was not contracting and could not contract with respect to the statutory right of action given his representatives or heirs by statute, we are still thrown back on the question first discussed, viz: whether the statute gives any action where the deceased could not have maintained one.

The court further says, that "A man cannot barter away his life, his freedom or his substantial rights." This is a mere glittering generality and radically unsound if taken broadly and literally. As applied by the court it is in conflict with the decision of this court in *Baltimore & Ohio R. R. Co. v. Voigt*, 176 U. S., 498. And if granted the question still remains, whether the statute gives any right to maintain an action for death where the deceased could not have recovered had he survived.

(C) That the contract was binding on the deceased—that a man may lawfully contract with a carrier to ride on its trains at his own risk—is held by the weight of authority. In the case of

Voigt above cited, p. 513, the distinction was drawn between cases like *Railroad Co. v. Lockwood*, 17 Wall., 357, where the dispensation from liability for injuries was made a condition of transportation, which the passenger had a right to demand and which the carrier was under a legal duty to furnish, and cases where one is on a train not by virtue of any *right*, but solely because of a special contract entered into as a condition of the carriage.

This case is like the *Voigt* case. The deceased for a valuable consideration, without compulsion, by fair contract well understood and signed by him, assumed the risk of traveling, agreed that as to him the company was not bound for the neglect of its servants, as a carrier is bound. Gratuitous carriage was a valuable consideration for the agreement. In the case of *Voigt* this court cites with approval many decisions holding such contracts valid.

The great weight of authority sustains the proposition that one who accepts a purely gratuitous pass can bind himself by contract to relieve the carrier from liability for personal injury, and as observed by Judge Putnam in *Duncan v. Maine Central R. R. Co.*, 113 Fed. 508, 514:

> "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

The following cases fully sustain this doctrine: *Quimby v. Boston & Maine Railroad*, 150 Mass. 365; *Griswold v. New York, etc. Railroad*, 53 Conn.

371; *Muldoon v. Seattle City Ry.* (above cited); *Gulf, Colorado & Santa Fe Ry. v. McGown*, 68 Texas, 640; *Duncan v. Maine Central R. R. Co.*, 113 Fed. Rep. 508; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261; *Kinney v. Central R. R. Co.*, 34 N. J. L., 513, and the recent case of *Payne v. Terre Haute & Indianapolis Ry. Co.* 157 Ind., 616, where the opinion was by Judge Baker, present United States Circuit Judge. *Roering and wife v. Chesapeake Beach Ry. Co.*, Court of Appeals, District Columbia, upon the present calendar of this court. See also article, 57 *Central Law Journal*, p. 83.

C. W. Bunn.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

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vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

STATE OF MINNESOTA,
ss.
County of Ramsey.

Charles W. Bunn being duly sworn deposes and says he is counsel for the Northern Pacific Railway Company in this action; that shortly after the writ

of certiorari was allowed herein, namely, on the third day of November, 1902, deponent prepared a stipulation to the effect that the certified record now on file with the clerk of this court, which was filed with the petition for certiorari, should stand as the record herein, and that the clerk of the circuit court of appeals in making return to the writ of certiorari might return said stipulation instead of said record; deponent sent this stipulation on the third of November, 1902, to the attorneys of said railway company at Spokane, Washington, which is the residence of counsel in this case for Louise H. Adams and Frank H. Adams, asking that the stipulation be presented to said counsel with the statement that it was the ordinary practice in such cases to make such stipulations, and that the purpose thereof was to save unnecessary expense; deponent has been advised by the said attorneys of the Northern Pacific Railway Company that said stipulation was, on receipt thereof, presented to Messrs. Voorhees and Voorhees (who are attorneys of record both in the circuit court and in the circuit court of appeals of the said Louise H. Adams and Frank H. Adams) and said explanatory statement made to them, and that they declined to make such stipulation. Since then as this deponent is advised the clerk of the circuit court of appeals of the ninth circuit has also informed Messrs. Voorhees and Voorhees that the record heretofore filed in this court with the petition constituted the entire and correct record, and that a re-certification of the same would simply be a duplication, and

that it was the general practice in that circuit as well as in other circuits to make stipulations of the character submitted and requested by deponent; but said Voorhees and Voorhees have declined to make such stipulation.

Deponent paid to the clerk of the circuit court of appeals for the ninth circuit $455.40 for the certified copy now on file in this court, which he believes is the proper fee and necessary to be paid in order to obtain another certified copy of said record.

Deponent is informed that in two cases at the present term, namely, *John A. Humbird and Frederick Weyerhaeuser v. Waldo Avery, et al.*, and *United States v. Northern Pacific Railway Company, et al.*, this court has of its own motion ordered that the record filed with the petition for certiorari stand as the return to the writ.

CHARLES W. BUNN.

Subscribed and sworn to before
me this 23d day of December, 1902.

EDWIN IRLE,
Notary Public,
Ramsey County, Minnesota.

(Notarial Seal)

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 466.

NORTHERN PACIFIC RAILWAY COMPANY,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

To MESSRS. VOORHEES AND VOORHEES,
Attorneys for Louise H. Adams and Frank H. Adams.

You will please take notice that the undersigned will move the court on the second Monday of January, 1903, namely, January 12th, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order that the certified copy of the record herein filed with the petition for certiorari stand as the return to the writ.

This motion will be based upon the record and files of the court and upon the attached affidavit of Charles W. Bunn herewith served.

Dated, December 23, 1902.

C. W. BUNN,
Counsel for Northern Pacific Railway Co.

FILE COPY.

FILED
JAN 9 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. ~~136~~ 143

NORTHERN PACIFIC RAILWAY COMPANY

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Now comes the Northern Pacific Railway Company, by its counsel, and respectfully moves this honorable court that an order may be entered herein directing that the certified transcript in said cause, filed with the petition for the writ of certiorari, stand and be taken as the return to such writ of certiorari heretofore granted by the court, and in support of this motion submits the accompanying affidavit of Charles W. Bunn.

C. W. BUNN,
Attorney for Northern Pacific Railway Company, Petitioner.